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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-

79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JACK O. JOHNSON
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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Petitioner, RAYMOND ROBERT CLARK, asks that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered on November 21, 1979, rehearing denied February 19, 1980.

CITATIONS TO THE OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 379 So.2d 97 (Fla.1980), and is set out in Appendix A.

JURISDICTION

The opinion of the Supreme Court of Florida was filed on November 21, 1979, and is set out in Appendix A. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3). Petitioner asserted below and is asserting here deprivation of his rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the trial court erred in denying Petitioner's motion for a statement of particulars of the aggravating circumstances on which the State would rely, infringing upon Petitioner's constitutionally guaranteed rights of due process of law and notice of the charges against him.

II. Whether the trial court can define and control the Petitioner's Sixth Amendment right to a public trial at the expense of his Sixth Amendment rights to effective assistance of counsel and an impartial jury by permitting, over objection, the presence of the electronic media at his trial.

III. Whether the trial court erred in denying the indigent Petitioner's motion for appointment of an expert psychiatrist to aid the defense in the preparation of its case regarding the Petitioner's guilt and regarding potential mitigating circumstances, thereby denying the Petitioner's rights to due process and equal protection.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves Section 921.141(5), Florida Statutes (1977) which are set out in Appendix B.

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder, kidnapping with intent to commit a felony, and extortion in the Circuit Court for Pinellas County, Florida. (R1471-1473) Following the jury's advisory verdict of death, Circuit Judge Robert E. Beach then sentenced Petitioner to death for the murder. He also sentenced Petitioner to a consecutive life term for the kidnapping charge and a consecutive fifteen year term for the extortion charge.

The Florida Supreme Court affirmed the conviction and sentence (although reducing the number of aggravating factors found by the trial court) in an opinion reported at 379 So.2d 97. Petitioner now seeks a review of this judgment in this Court.

Prior to the trial, Petitioner filed and the court denied three motions relevant for purposes of this petition. First, he asked for a statement of particulars of the aggravating circumstances the State intended to rely upon in its request for the imposition of the death penalty. (R991-993, 1093) Second, he asked the court to exclude the television cameras from the courtroom or declare their use unconstitutional. (R1080-1084,1245) Trial counsel objected to its presence and location because of its upsetting effect upon her and its possible prejudicial effect upon the jury. The court, in

response to these objections, merely said that it was bound by the Florida Supreme Court's interim order allowing television cameras in the court. [See In re Petition of Post, Newsweek Stations, Inc., 347 So.2d 402 (Fla.1977)] Finally, Petitioner asked the court to appoint an expert psychiatrist. (R10,180)

The Florida Supreme Court reviewed Petitioner's case and considered the following points on appeal, among others:

> POINT I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING ON THE APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.
>
> POINT II. THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO EXCLUDE TELEVISION CAMERAS FROM THE COURTROOM DURING TRIAL DUE TO THEIR DISTRACTIVE EFFECT ON THE ATTORNEYS AND JURORS ESPECIALLY WHERE THE CAMERAS WERE FACING THE JURORS AND THE JURORS WERE IN FACT TELEVISED.
>
> POINT III. THE TRIAL COURT ERRED IN DENYING THE INDIGENT APPELLANT'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE APPELLANT'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

In the opinion filed in Petitioner's case the Florida Supreme Court held that:

1. His motion for a statement of particulars was properly denied. Clark, supra, at 104.

2. Television cameras were properly admitted in the courtroom, and, in any event, Petitioner had not shown any prejudice by their presence. Id., at 103.

3. Petitioner had asked for a psychiatrist only as to the possible defense of insanity and had waived appointment for any other use. Id., at 103.

REASONS FOR GRANTING CERTIORATI

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHERTHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING UPON PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHT OF DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.

Under the concept that our criminal justice system is an evolving process, the Petitioner asks this Honorable Court to examine his contention that our notions of fair play and justice now require prosecutors to disclose what aggravating factors they plan to use to condemn him to die. When placed in context of this evolutionary process, his contention is neither shocking or inconsistent with prior decisions of this Court.

For example, in Brady v. Maryland, 373 U.S. 83 (1963) this Court concluded that justice was best served when the procecution was required to reveal any exculpatory material to the defense. Likewise, fair play required that the defense reveal to the prosecution any alibi they may have intended to rely upon.

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. (footnote ommitted.) Williams v. Florida, 399 U.S. 78, 82 (1970).

In death cases, this evolutionary process has been accelerated because death, in its finality, is different. Gregg v. Georgia, 428 U.S. 153 (1976). Thus, fair play and the demands of justice are strictly applied to insure no man dies because of surprise or caprice. Rationality and consistency in the sentencing process, are the keys to be used to examine the death penalty cases. Proffitt v. Florida, 428 U.S. 242, 258-259 (1976).

Accordingly, this Court in Gardner v. Florida, 430 U.S. 349, 359 (1977) said that the court must inform the defendant of all material he used in sentencing the defendant to death because in some instances the judge's decision of whether the defendant should live or die may depend upon such information.

Underlying all these cases and particularly relevant in death cases is the philosophy that justice is best served when the prosecution acts in the sunshine instead of hiding its secrets in the closet until trial or sentencing. Moreover, in death cases, every effort must be made to insure that arbitrariness and caprice are removed. If death is given, it is imposed only upon a rational decision that on the balance the aggravating factors outweigh mitigating factors. Trial tactics and surprise have no part in a sentencing of such magnitude.

This case is a prime example of what happens when there is no disclosure of aggravating circumstances. In justifying imposing death upon Petitioner, the trial court impermissibly doubled two aggravating factors. Clark, supra, at 104. While the Florida Supreme Court caught the mistake, nevertheless, with prior knowledge of the aggravating factors

relied upon by the State, defense counsel may have been able to avert this error and effectively rebut their use as aggravating factors.

With a man's life depending upon what those factors are, our sense of justice requires that he be given advance notice of them so he can at least prepare to meet them at trial.

II.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT CAN DEFINE AND CONTROL THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL AT THE EXPENSE OF HIS SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND AN IMPARTIAL JURY BY PERMITTING, OVER HIS OBJECTION, THE ELECTRONIC MEDIA TO PRESENT AT HIS TRIAL.

If the Petitioner's right to a public trial is a right personal to himself, can he control how public the trial will be? Once he has asserted that right has he lost all control over "how public" it will be? Or can he move the court to exclude the electronic media because of trial counsel's apprehension at their presence?

In Gannett-Press v. Despaquale, ___ U.S. ___, 61 L.Ed.2d 608 (1979), this Court held that the Sixth Amendment's guarantee of a public trial is personal to the accused. Id., at 623. That is, the public at large cannot assert this right. Id., at 622. This Court, however, expressly refused to rule on the issue of whether a defendant's right to a public trial also implied that he has the opposite right to insist upon a private or secret trial.

> The question in this case is not, as the dissenting opinion repeatedly suggests, post, at ___, 61 L.Ed.2d ___, whether the

Sixth and Fourteenth Amendments give a defendant the right to compel a secret trial. Id., 626, fn 11.

The question presented here falls between the issue as framed by the opinion of the court in Gannett and the dissent in that opinion. Petitioner was granted a public trial, but wanted to retain some control over the extent of its publicity by excluding only the electronic media. This issue is particularly crucial to Petitioner, as his counsel was especially unnerved by the camera's presence. (R2950-2951) Likewise, the position of the camera being conspicuously located to the jury (R2950) may have had some impact upon the jury's analysis of the trial evidence. Petitioner's counsel, in short, objected not only to the camera's placement, but its very presence.

The trial court, however, rejected these claims, saying that it had no discretion as to the presence of the cameras and that counsel would "get use to" them. (R2953) Likewise, the Florida Supreme Court said that Petitioner had failed to demonstrate any specific denial of due process by the cameras presence. Clark, supra, at 103.

Thus, the issue presented by this case expresses the tension between Petitioner's right to a public trial, the extent to which he or the trial court can control just "how public" it will be, and his Sixth Amendment rights to assistance of counsel and an impartial jury. Petitioner, in short, sought to "compel a secret trial" only to the extent that he wanted to protect his Sixth Amendment right to assistance of counsel and an impartial jury.

POINT III.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT ERRED IN DENYING THE INDIGENT PETITIONER'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE PETITIONER'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

This case, by posing the question presented, seeks to inquire whether the rationale underlying Gideon v. Wainwright, 372 U.S. 335 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956) extends the appointment of a psychiatrist to aid defendants in preparation not only of their defense during the guilt/innocence phase of a death penalty trial, but also during the sentencing phase of that trial.

Since Gideon, this Court has recognized that "... lawyers in criminal courts are necessities, not luxuries." Gideon, supra, at 344. There is, of course, no inherent magic in merely having a lawyer present during trial. To the contrary, it is his knowledge, experience and abilities that are thought so vital to a fair trial of the criminally accused. But, unless counsel has the tools or means to give expression to his expertise, appointment of counsel means little, and in fact, exalts the formality of appointing counsel over the substance of providing effective legal assistance.

In Florida, capital cases involving the death penalty are unique. Death penalty trials from the outset are treated differently. Appointed defense counsel representing an indigent are usually seasoned veterans who spend far more time investigating and preparing death cases than they do on non-death cases. Moreover, the Florida Legislature has enacted elaborate

special procedures applicable only in death cases to insure that whatever sentence is imposed is not arbitrarily or freakishly given. Proffitt v. Florida, 428 U.S. 242, 252-253 (1976). In the sentencing phase of the trial, moreover, the court is not limited to any specific category of mitigating factors. Lockett v. Ohio, 438 U.S. 586 (1978). In order to determine the appropriateness of death, the sentencing court must consider as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Id., at 608.

But for all the attention and special care given to death cases, it means nothing if an indigent's counsel is limited in the matters he can investigate and ultimately present to a judge and jury. For example, in an earlier murder charge a psychiatrist had said that Petitioner was incompetent to stand trial. (R1490-1491) His earlier suicide attempts, pedophillia and the facts surrounding this murder certainly indicate something was and is wrong with him. Because Petitioner, a poor man, could not afford to hire a psychiatrist that a wealthy person may have engaged, he was unable to investigate whatever facts may have been present to support his claims in mitigation. Hence, he was denied equal protection of the law.

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Griffin, supra, at 19.

Thus, this case proceeds from the foundation laid by Gideon and asks this Court to examine whether an indigent defendant can be effectively represented by counsel if a

psychiatrist is not appointed to assist him in a death case in preparing his defense in both the guilt/innocence and sentencing phases of his trial.

CONCLUSION

Therefore, the Petitioner asks this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

JACK O. JOHNSON
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: P. Douglas Brinkmeyer
P. DOUGLAS BRINKMEYER
Assistant Public Defender
Chief - Appellate Division

DAVID A. DAVIS
Assistant Public Defender

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg., 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, by mail this 20 day of March, 1980.

P. Douglas Brinkmeyer
P. DOUGLAS BRINKMEYER

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APPENDICES
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That portion of the decision of the district court of appeal which reverses the judgment of guilt for second degree murder is quashed and the cause is remanded with instructions to affirm the judgment and sentence for second degree murder and reconsider the judgment and sentence for robbery. See *State v. Pinder*, 375 So.2d 836 (1979).

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON and ALDERMAN, JJ., concur.

Raymond Robert CLARK, Appellant,
v.
STATE of Florida, Appellee.

No. 52716.

Supreme Court of Florida.

Nov. 21, 1979.

Rehearing Denied Feb. 18, 1980.

Defendant was convicted in the Circuit Court, Pinellas County, Robert E. Beach, J., of first-degree premeditated murder, kidnapping and extortion and was sentenced to death. Defendant made direct appeal to the Supreme Court. The Supreme Court held that: (1) the verdict was not contrary to the weight of the evidence; (2) trial court did not err in denying defendant's motion for a new trial on the basis of newly discovered evidence; (3) trial court did not commit reversible error in denying defendant's motion to allow jury to retire from deliberations after they had deliberated for a long period of time without a break; (4) trial court did not erroneously limit cross-examination of State's key witness; (5) State could elicit testimony relating to defendant's refusal to give voice exemplars; (6) compilation of a list of illnesses and disabilities which may disqualify a potential juror from service did not require exclusion of the entire jury panel; and (7) imposition of death penalty was proper.

Affirmed.

1. Criminal Law ⇐1159.2(5)

Weight of evidence is ordinarily a matter which falls within exclusive province of jury to decide and Supreme Court will not reverse a judgment based upon a verdict returned by a jury when there is competent evidence which is also substantial in nature to support jury's verdict.

2. Extortion and Threats ⇐22
Homicide ⇐253(1)
Kidnapping ⇐5

Verdict of guilty on counts of first-degree premeditated murder, kidnapping and extortion was not contrary to weight of evidence in case in which evidence given by key witness who was coperpetrator contained no discrepancies and was corroborated by witness identification of defendant's vehicle and of defendant's physical features and voice.

3. Criminal Law ⇐938(1), 1156(3)

A motion for a new trial based on newly discovered evidence is addressed to sound discretion of trial court and only rarely will its determination be disturbed.

4. Criminal Law ⇐938(1)

A new trial will not be awarded on basis of newly discovered evidence unless evidence was discovered after trial, due diligence was exercised to have such evidence at former trial, evidence goes to merits of cause and not merely to impeach a witness who testified, evidence is not cumulative, and it is such that it probably would have changed verdict.

5. Criminal Law ⇐938(1)

Motion for new trial after convictions of first-degree premeditated murder, kidnapping and extortion based on newly discovered evidence in form of a letter from a former cellmate of defendant's coperpetra-

tor stating that coperpetrator had told him that he had shot victim was properly denied where evidence was of an inherently noncredible nature, merely went to impeach credibility of coperpetrator who had testified that defendant had killed victim, and defense had similar information at time of trial but elected not to present such evidence to jury.

6. Criminal Law ⇐865(2)

Trial court in prosecution for first-degree premeditated murder, kidnapping and extortion did not abuse its discretion in denying defendant's motions to allow jury to retire from its deliberations made after nine hours of jury deliberation and renewed two hours later where defendant failed to demonstrate how he was denied a fair trial by an impartial jury on basis of length of time jury deliberated.

7. Witnesses ⇐327

In prosecution for first-degree premeditated murder, kidnapping and extortion, trial court's sustaining State's objection to defense counsel's questioning of State's key witness as to whether he had ever been treated by a psychiatrist or psychologist did not erroneously limit defendant's cross-examination of that witness where there was no information as to what psychiatrist's tests showed or how they would dispute witness' credibility.

8. Criminal Law ⇐393(1)

Fifth Amendment offers no protection against compulsion to submit a voice exemplar and does not privilege refusal to submit, and thus admission into evidence of defendant's refusal to give voice exemplars was not error. U.S.C.A.Const. Amend. 5.

9. Jury ⇐33(1)

Compilation of a list of illnesses and disabilities which may disqualify a potential juror from service did not systematically or intentionally exclude any economic, social, religious, racial, political, or geographical group, and is not grounds for excluding entire jury panel. West's F.S.A. § 40.01(3).

10. Constitutional Law ⇐268(2)

Cameras in the courtroom are not a p se deprivation of defendant's due proce rights. U.S.C.A.Const. Amend. 14.

11. Criminal Law ⇐618

Trial court did not abuse its discreti in denying defendant's motion for seve ance of extortion charge from murder a kidnapping charges and consolidation of o fenses did not prejudice defendant's rig to a fair trial, in case in which some ev dence relevant to extortion charge would admissible at trial on murder and kidna ping charges.

12. Costs ⇐302.4

Trial court did not err in denying d fendant's request that court appoint a pa ticular psychologist to examine defenda and to test him to determine whether possible defense of not guilty by reason insanity existed and to make his repo confidential and solely to defendant's cou sel for his determination of whether or n to make sanity an issue at trial since d fendant refused to move for a sanity inqu sition and to comply with requirements rule governing such matters." 33 West F.S.A. Rules of Criminal Procedure, ru 3.210.

13. Homicide ⇐354

Defendant who was convicted of firs degree premeditated murder, kidnappi and extortion and sentenced to death w not entitled to a statement of particulars to aggravating circumstances upon whi State would rely and present evidence of support its request for death penalty.

14. Costs ⇐302.4

Defendant who was convicted of firs degree premeditated murder, kidnappi and extortion and sentenced to death w not entitled to have a psychiatrist appointe to assist him in establishing mitigating ci cumstance of commission of crime whi under extreme mental or emotional distu bance where no such request was made trial court.

15. Homicide ⇐354

In sentencing defendant convicted of first-degree premeditated murder, kidnapping and extortion to death, trial court erred in finding as two separate aggravating circumstances that murder was committed during a robbery and that murder was committed for pecuniary gain and in finding as two separate aggravating circumstances that victim was killed in order to eliminate him as a witness to robbery and that murder was committed to hinder law enforcement, but such doubling-up of aggravating circumstances did not require resentencing where there remained several aggravating circumstances to support imposition of death penalty.

Jack O. Johnson, Public Defender, and James R. Wulchak, Asst. Public Defender, Bartow, for appellant.

Jim Smith, Atty. Gen. and Richard G. Pippinger, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Raymond Robert Clark was adjudged guilty of murder in the first degree and was sentenced to death. His conviction and sentence of death are before this Court on direct appeal pursuant to article V, section 3(b)(1), Florida Constitution. Clark also appeals his convictions of kidnapping and extortion.

Clark raises several points on appeal which relate to his convictions. These include whether the trial court erred in denying his motion for a new trial on the basis that the verdict was contrary to the weight of the evidence; whether the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence; whether the trial court committed reversible error in denying his motion to allow the jury to retire from deliberations where they had deliberated for a long period of time without a break; whether the trial court erroneously limited cross-examination of the State's key witness; whether error was committed when the State was permitted to elicit testimony relating to Clark's refusal to give voice exemplars and when the jury was instructed concerning Clark's refusal; whether it was error to deny Clark's motion to exclude the entire jury venire; whether the trial court erred in denying Clark's motion to exclude cameras from the courtroom; whether the court erred in not severing the extortion charge from the murder and kidnapping charges; and whether the court erred in denying Clark's motion for appointment of a certain psychologist. For the reasons which follow, we find that none of these issues have merit and, therefore, affirm the convictions. Clark raises five issues which relate to the sentencing phase of his trial. These are whether the court erred in denying Clark's motion for a statement of particulars of the aggravating circumstances on which the State would rely; whether a psychiatrist should have been appointed to assist him in establishing the mitigating circumstance of commission of the crime while under extreme mental or emotional disturbance; whether section 921.141, Florida Statutes (1975), restricts the mitigating circumstances to be considered; whether the trial court improperly doubled up certain aggravating circumstances; and whether the trial court erred in failing to find mitigating circumstances. We find merit only with his contention that the trial court erroneously doubled up aggravating circumstances; however, because we determine that the trial court correctly concluded that there are no mitigating circumstances, we hold that this error does not require reversal of the death sentence.

Raymond Clark first met his accomplice, Ty Johnston, in California when Johnston was fourteen years old and was living at a juvenile group home. Clark, who was then thirty-four, lived with Johnston in California for two years prior to the murder. He fed, clothed, and sheltered Johnston and introduced himself as Johnston's father, but, in fact, the pair had a homosexual relationship. Clark was the first and only person with whom Johnston had a homosexual relationship. Because the group home was being closed down and Johnston would have to move to a juvenile detention center,

Clark decided to take Johnston to St. Petersburg, Florida, where the two of them moved in with Clark's girl friend.

Because he was in need of money, Clark formulated a plan to kidnap someone at a bank and to demand money from that person. In furtherance of Clark's plan, on April 27, 1977, Clark and Johnston drove into several bank parking lots looking for a victim. Clark was armed with a .38 caliber pistol. They finally parked Clark's Chevrolet Blazer in the parking lot of a bank next to a white Cadillac and awaited the return of the owner of the Cadillac. The victim was a forty-nine-year-old businessman who had been to the bank to arrange a real estate closing. When he returned to his automobile, the victim was ordered by Clark to get into his own car. Clark then got into the passenger's side of the vehicle and ordered the victim to drive to several different locations in search of a deserted area. Johnston followed in Clark's Blazer. After an hour and a half of driving, the victim was finally directed to park his automobile in a secluded spot where he was ordered at gunpoint to get out of the vehicle. Clark commanded him to disrobe with the exception of his undershorts and then forced him to write a check on his personal account, payable to cash, in the amount of five thousand dollars. Clark proceeded to tie the victim's hands behind his back with wire and then asked Johnston whether he wanted to shoot the victim. Johnston replied that he did not. Clark then marched the victim into the bushes, made him kneel down, and shot him twice in the back of the head. When the victim's body was later found, his undershorts were down around his knees.

Clark, driving the Cadillac, and Johnston, driving the Blazer, drove back to Clark's girl friend's residence where they left the Blazer. They proceeded to the bank in the victim's Cadillac to cash the check. At the bank, Clark attempted to cash the check, but the teller refused. The Cadillac was then driven to a secluded location where Clark and Johnston wiped it down to eliminate any fingerprints.

Thereafter, concerned that he could face kidnapping charges for taking Johnston, a minor, from California, Clark drove Johnston back to California on the same day as the murder. Several days later Johnston went to live with his parents in California.

On May 9, 1977, before the victim's body had been found, Detective San Marco received a telephone call from a man, whom he testified sounded like Clark, inquiring as to the status of the police investigation relating to the disappearance of the victim. Thereafter, Clark made several threatening phone calls to the victim's son demanding ten thousand dollars for his father's safe return. In these phone calls, Clark described several items contained in the victim's car, including a V-neck tee shirt which he had used to wipe the fingerprints from the car and which had not been mentioned in newspaper accounts which had described the articles of clothing found in the victim's car. Several of these phone calls were traced to Clark's girl friend's residence. This residence had been placed under police surveillance. At the times the calls were made from this residence, there is evidence to place Clark in the residence, and at the time the calls were placed outside this home, there is evidence to show that Clark had gone out.

During the investigation of these extortion threats, the police developed the identity of Clark's accomplice, Ty Johnston, whom they brought back to Florida. Johnston described the kidnapping and murder and Clark's primary role in the incident and led the police to a wooded area where they found the victim's badly decomposed body lying face down in a patch of palmettos with two bullet wounds in the back of his head, with his hands wired behind his back, and with his undershorts down around his knees.

Clark was charged with first-degree premeditated murder, kidnapping and extortion. At trial, Ty Johnston described in detail Clark's role in the murder and kidnapping. Clark presented no defense. The jury returned a verdict of guilty on all three counts.

Analogizing this case to *Tibbs v. State*, 337 So.2d 788 (Fla.1976), Clark initially argues that the testimony of the State's key witness was unreliable and unworthy of belief and that the trial court erred in denying his motion for a new trial on this basis. He contends that the principal evidence against him came from a co-perpetrator, who had an interest in the outcome of the case, who lied to save himself, and who lied out of vindictiveness.

This case, however, is not at all analogous to *Tibbs v. State* wherein it appeared clearly from the record that the uncorroborated testimony of the victim of the crime was inherently unreliable. In *Tibbs*, the only identification witness was under the influence of marijuana at the time of the crime and had never seen the defendant before the day of the crime; there was a real question as to the identification procedure first used by the police; the vehicle connected with the crime was never found; there were discrepancies in the testimony of the State's witness relating to material elements of the case; and Tibbs put on a defense. The features, which we found cast doubt on the believability of the victim in *Tibbs*, are not present in this case.

[1] The weight of the evidence is ordinarily a matter which falls within the exclusive province of the jury to decide, and we will not reverse a judgment based upon a verdict returned by a jury when there is competent evidence which is also substantial in character to support the jury's verdict. *Tibbs v. State*; *McNeil v. State*, 104 Fla. 360, 139 So. 791 (1932).

[2] There are no discrepancies in the essential facts of Johnston's testimony. There is no question as to the identification of Clark or the fact that Clark's Blazer was identified as being in the bank's parking lot at the precise time that the victim was abducted. The teller at the bank testified that, when Clark put on his sunglasses, he looked like the person who attempted to cash the victim's check of five thousand dollars. She stated that the build of his face, his height, his weight, the hair on his arms, his beard, his long hair, and the way his glasses fit on his head looked like Clark's features. Detective San Marco testified that Clark's voice sounded the same as the voice of the person who had called him to see how the investigation of the case was developing. The jury found Johnston to be credible and believed his account of the essential elements of the crime. We hold that the trial court did not err in denying Clark's motion for a new trial on this ground since the record contains substantial credible evidence to support the jury verdict.

[3-5] We also find not abuse of discretion in the trial court's denial of Clark's motion for new trial based upon an alleged discovery of new evidence: a letter from a former cell mate of Johnston's stating that Johnston had told him that he had shot the victim. A motion for new trial based on newly discovered evidence is addressed to the sound discretion of the trial court, and only very rarely will its determination be disturbed. *Baker v. State*, 336 So.2d 364 (Fla.1976); *Bell v. State*, 90 So.2d 704 (Fla. 1956). A new trial will not be awarded on the basis of newly discovered evidence unless the evidence was discovered after trial, unless due diligence was exercised to have such evidence at the former trial, unless the evidence goes to the merits of the cause and not merely to impeach a witness who testified, unless the evidence is not cumulative, and unless it is such that it probably would have changed the verdict. *Harvey v. State*, 87 So.2d 582 (Fla.1956); *McVeigh v. State*, 73 So.2d 694 (Fla.1954); *Branch v. State*, 96 Fla. 807, 118 So. 13 (1928); *Hudson v. State*, 353 So.2d 638 (Fla. 3d DCA 1977). The evidence upon which Clark relied to support his motion for a new trial, in reality, was not newly discovered evidence but rather was only a newly discovered witness. This evidence is of an inherently non-credible nature and merely goes to impeach the credibility of a witness. After considering the motion for a new trial, the trial court properly determined that Clark had information of a similar type available to him at the time of trial, but he elected not to present such evidence to the jury. The trial

court also stated that there has been no showing that Clark would use this witness for a similar type of testimony in a new trial and that, in fact, there was no likelihood he would use it. Since the defense had similar information at the time of trial, the trial court correctly did not consider the letter to be newly discovered evidence.

[6] Clark also challenges the denial of his motion to allow the jury to retire from its deliberations. He contends that, because of the lengthy period of deliberation, he was denied a fair trial by an impartial jury, free from outside influences. After nine hours of jury deliberation, Clark requested the court to call the jury back and to permit them to return to their hotel for the evening. He renewed this motion two hours later. Expressing concern that to insert itself into jury deliberation at the times requested would be prejudicial to the defendant and the State because the jury could be at a very critical point in their deliberations, the court denied the first motion and further explained that there was nothing to indicate that the jurors were deadlocked or were not actively engaged in constructive deliberations or that they were tired and wanted to recess. In denying the second motion to recess the jury, the court expressed the view that it was fearful that, if it sent a note to the jury telling them they could break, they might take this as a subtle form of intimidation to arrive at a verdict more hastily than they normally would. The trial court did not abuse its discretion in denying these motions to recess. Clark has failed to demonstrate how he was denied a fair trial by an impartial jury on the basis of the length of time the jury deliberated.

[7] Clark next suggests that the court erroneously limited his cross-examination of Johnston. Defense counsel asked the witness whether he had ever been treated by a psychiatrist or psychologist. The State objected that the testimony was irrelevant, and the trial court sustained the objection. Johnston's competence had not been made an issue. Although Clark contends that this constituted a curtailment of his inquiry into the credibility of a witness and violated his right of confrontation, he does not show how an affirmative answer to this inquiry would in any way affect the truth or falsity of Johnston's testimony. During oral argument, defense counsel conceded that he had no information as to what the psychiatrist's tests showed or how they would dispute Johnston's credibility. The most the jury could have done with an affirmative response to this question was to speculate or conjecture about Johnston's mental condition.

[8] Although acknowledging that the results of the voice exemplar are admissible, Clark next claims that the trial court erred in permitting the State to elicit testimony relative to his refusal to give voice exemplars and in instructing the jury to give the evidence of refusal such weight and consideration as it deserved in light of all the evidence. This point is likewise without merit. Prior to trial, the State filed a motion to compel a voice exemplar on the basis that it had reasonable grounds to believe that certain tape recorded telephone conversations in evidence were made by Clark. The court ordered Clark to give a voice exemplar in the exact words used by the extortionist. Clark refused on the basis that the giving of a voice sample violated his fifth amendment rights, and he was held in contempt. Clark's privilege against self-incrimination would not have been violated by compelling him to speak the words spoken by the extortionist, and therefore his refusal to speak was not an exercise of this right. Since the fifth amendment offers no protection against compulsion to submit a voice exemplar and since it does not privilege refusal to submit, the admission of Clark's refusal into evidence was not error. *See Joseph v. State*, 316 So.2d 585 (Fla. 4th DCA 1975); *Boyer v. State*, 122 So.2d 19 (Fla. 4th DCA 1966); *Higgins v. Wainwright*, 424 F.2d 177 (5th Cir. 1970), *cert. denied*, 400 U.S. 905, 91 S.Ct. 145, 27 L.Ed.2d 142 (1970). Furthermore, we find no error in the trial court's instruction to the jury pertaining to this refusal.

[9] Clark next argues that the trial court erred in not excluding the entire jury panel because some prospective jurors are automatically excluded by the clerk for illnesses or disabilities which he alleges do not constitute physical infirmities as required by section 40.01, Florida Statutes (1977).[1] To effectuate this statute, Pinellas County has compiled a list of illnesses and disabilities which may disqualify a potential juror from service. Clark maintains that the exclusion of these certain classes of people deprived him of a representative cross-section of the community. The trial court disagreed with Clark, found substantial compliance with the statute, and denied the motion for exclusion. We agree with the trial court and find no error in its ruling. There is no suggestion that the selection process in Pinellas County systematically and intentionally excludes any economic, social, religious, racial, political, or geographical group. *See Reed v. State*, 292 So.2d 7 (Fla.1974), *cert. denied*, 419 U.S. 995, 95 S.Ct. 307, 42 L.Ed.2d 268 (1974); *State v. Silva*, 259 So.2d 153 (Fla.1972).

[10] Clark also made a motion to have the rule allowing cameras in the courtroom during his trial declared unconstitutional or, in the alternative, to have the trial court enter an order prohibiting the presence of cameras in the courtroom. This motion was denied. He contends that cameras in the courtroom are a per se deprivation of his due process rights. We find this contention to be without merit. *In Re: Petition of Post-Newsweek Stations, Florida, for Change in Code of Judicial Conduct*, 370 So.2d 764 (Fla.1979). Additionally, Clark has failed to demonstrate any specific denial of due process resulting from the presence of cameras in the courtroom during his trial.

[11] Acknowledging the great measure of discretion accorded trial judges on the question of severance and recognizing that some evidence relevant to the extortion charge would be admissible at trial on the murder and kidnapping charges, Clark asserts that the trial court erred in refusing to sever the extortion charge from the murder and kidnapping charges. We conclude that the trial court did not abuse its discretion in denying the motion for severance and that the consolidation of the offenses did not prejudice Clark's right to a fair trial. *See Smith v. State*, 365 So.2d 704 (Fla.1978); *Ashley v. State*, 265 So.2d 685 (Fla.1972).

[12] Furthermore, the trial court did not err in denying Clark's request for appointment of a psychologist. Although refusing to move for a sanity inquisition and to comply with the requirements of Florida Rule of Criminal Procedure 3.210, Clark requested that the court appoint a particular psychologist to examine Clark and to test him to determine whether a possible defense of not guilty by reason of insanity exists and to make his report confidential and solely to Clark's counsel for his determination of whether or not to make sanity an issue at trial. By his motion, Clark was attempting to circumvent Florida Rule of Criminal Procedure 3.210.

In addition to reviewing the record in light of these alleged errors asserted by Clark, which we have determined to be without merit, we also have reviewed the evidence pursuant to Florida Appellate Rule 6.16 to determine whether the interests of justice require a new trial and conclude that no new trial is required. Accordingly, the convictions are affirmed.

We now consider Clark's challenges to the imposition of the death penalty. The jury recommended that the death penalty be imposed. In ordering that the death penalty be imposed, the trial court found no mitigating circumstances and found the following aggravating circumstances:

A. The Defendant, RAYMOND ROBERT CLARK, was previously convicted in

1. Section 40.01(3) provides:

> In the selection of jury lists only such persons as the selecting officers know, or have reason to believe, are law abiding citizens of approved integrity, good character, sound judgment and intelligence, and who are not physically or mentally infirm, shall be selected for jury duty.

California of Murder in the First Degree, which carried a possible maximum sentence of death. The Defendant was sentenced to life imprisonment for the commission of that crime but was paroled after serving ten (10) years in the California prison system. At the time of the commission of the present homicide, he was on parole from California, but was in violation of that parole by being in Florida.

B. The murder in the present case was committed by the Defendant during the course of a robbery.

C. The victim in the instant case was killed in order to eliminate him as a witness to the robbery.

D. The murder was committed by the Defendant for pecuniary gain.

E. The murder was committed for the purpose of hindering enforcement of the robbery laws of this State.

F. The murder was committed by the Defendant in a cool, callous and heartless manner without mercy or compassion for the victim, and therefore, was an especially heinous, atrocious and cruel crime.

[13] Clark challenges his sentence upon several grounds. His contention that he was entitled to a statement of particulars as to the aggravating circumstances upon which the State would rely and present evidence of to support its request for the death penalty is without merit. *Menendez v. State*, 368 So.2d 1278 (Fla.1979). Furthermore, Clark's argument that Florida's death penalty statute restricts the mitigating circumstances which may be considered was recently dealt with in our decision in *Songer v. State*, 365 So.2d 696 (Fla.1978), wherein we held that Florida's death penalty statute does not violate the eighth and fourteenth amendments to the Constitution of the United States since it does not limit the trial judge to consideration of only the statutorily enumerated mitigating circumstances.

[14] Clark now claims that he was entitled to have a psychiatrist appointed to assist him in establishing the mitigating circumstance of commission of the murder while under extreme mental or emotional disturbance. A review of the record, however, reveals that no such request was made to the trial court, and the trial court was never given an opportunity to rule on whether Clark was entitled to a psychiatrist to assist him in the determination of mitigating circumstances. The motion for appointment of a psychiatrist only requested that a certain psychologist be appointed to examine Clark to determine if a possible defense of not guilty by reason of insanity was available to him.

[15] The State concurs with Clark's contention that the trial court erroneously doubled up certain aggravating circumstances which this Court held was prohibited in *Provence v. State*, 337 So.2d 783 (Fla.1976). We find that the trial court erred in finding as two separate aggravating circumstances that the murder was committed during a robbery and that the murder was committed for pecuniary gain and, in finding as two separate aggravating circumstances, that the victim was killed in order to eliminate him as a witness to the robbery and that the murder was committed to hinder law enforcement. Since we find that the trial court did not err in finding no mitigating circumstances, however, this defect in the trial court's order does not require resentencing. *Hargrave v. State*, 366 So.2d 1 (Fla.1978); *Elledge v. State*, 346 So.2d 998 (Fla.1977). Even with the elimination of the doubling-up of aggravating circumstances, there remain several aggravating circumstances to support the imposition of the death penalty. We find the death sentence to be warranted by the circumstances of this case.

Accordingly, having found no reversible error, we affirm the judgments and sentences.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.

921.15 Stay of execution of sentence to fine; bond and proceedings.

921.16 When sentences to be concurrent and when consecutive.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.

921.18 Sentence for indeterminate period for noncapital felony.

921.185 Sentence; restitution a mitigation in certain crimes.

921.20 Classification summary; Parole and Probation Commission.

921.21 Progress reports to Parole and Probation Commission.

921.22 Determination of exact period of imprisonment by Parole and Probation Commission.

921.231 Presentence investigation reports.

921.241 Felony judgments; fingerprints required in record.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19254, 1939; CGL 1940 Supp. 8052(260); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19254, 1939; CGL 1940 Supp. 8052(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 227a, ch. 19684, 1939; CGL 1940 Supp. 8625.24(4); s. 118, ch. 72-98; s. 1, ch. 73-172; s. 2, ch. 73-726; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 79-124.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 260a, ch. 19684, 1939; CGL 8438, 8427; CGL 1940 Supp. 8625.27(3); s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits, shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

History.—s. 261, ch. 19684, 1939; CGL 1940 Supp. 8625.27(1); s. 124, ch.